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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1095

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner*,

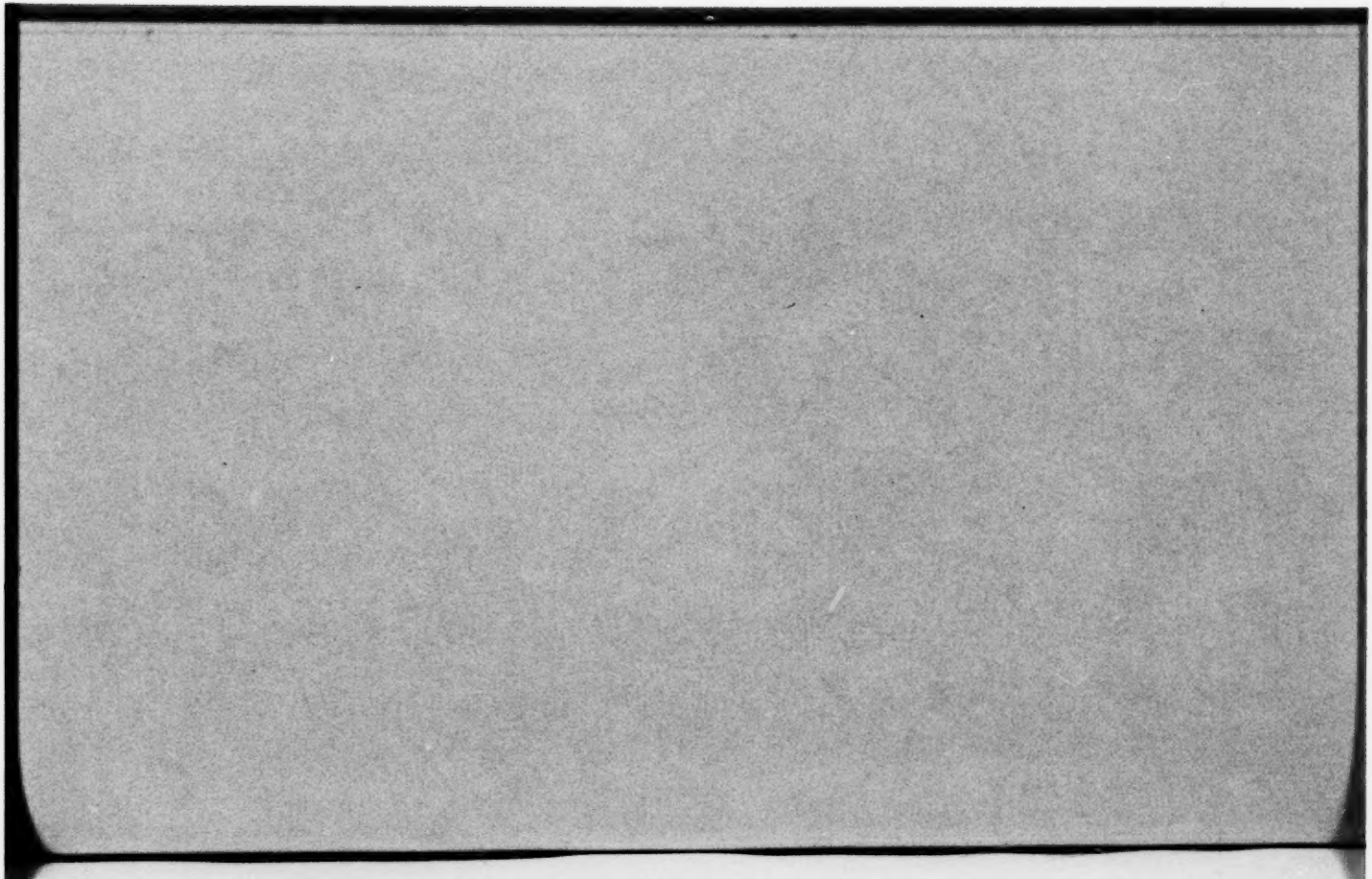
v.

P. L. MILLER, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
R. AUBREY BOGLEY,
WILLIAM F. ZEARFAUS,
JESSE F. HOLT,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



INDEX.

Page

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit 1

Summary Statement 1

Question Presented 3

Reasons for Allowance of Writ 3

Brief in support of petition 5

Opinions Below 5

Jurisdiction 5

Statement 6

Specifications of Error 6

Statute Involved 7

Argument 7

I. The Lower Court Erred in Holding that a Shipper's Claim for Damage to an Interstate Shipment, Liability for which has been Extinguished by Operation of the Provisions of the Uniform Bill of Lading, Nevertheless may be Revived, and Asserted by way of recoupment or otherwise, to defeat the carrier's claim for its Transportation Charges on such Shipment 7

II. The Lower Court Erred in Holding that the Terms of the Uniform Bill of Lading, which provide that "as a condition precedent to recovery * * * suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim * * *," May be Waived and Ignored 11

III. The Lower Court Erred in Refusing to Hold that the Shipper's Failure to Institute Suit for Damages within the time Prescribed in

Page

the Bill of Lading not only Terminated the Shipper's Claim and Cause of Action, but Extinguished the Carrier's Liability Therefor, where the Bill of Lading Provided that in the Event of such Failure "no carrier hereunder shall be liable, and such claims will not be paid." 13

IV. The Lower Court Erred in Attempting to Apply the Texas Law of Recoupment Contrary to the Specific Provisions of the Bill of Lading Contract as Interpreted by the Decisions of this Court 14

V. The Lower Court Erred in Affirming the Judgment of the District Court of the United States for the Eastern District of Texas, Sherman Division 17

CASES CITED.

Chesapeake & O. Ry. Co. v. Martin, 283 U. S. 209 ...4, 9, 12
Chicago & N. W. Ry. Co. v. Lindell, 281 U. S. 14 ..... 4, 9
Finn v. United States, 123 U. S. 227 13
Georgia, Fla. & Ala. Ry. Co. v. Blish Co., 241 U. S. 190 .....3, 10, 11
Morriss-Buick Company v. Davis, 127 Texas 41, 91 S. W. (2d) 313 14
Pennsylvania R. R. Co. v. Olivit Bros., 243 U. S. 574 ... 16
Phillips v. Grand Trunk Ry., 236 U. S. 662 .....4, 13, 15
Southern Ry. Co. v. Prescott, 240 U. S. 632 8
Texas & Pac. Ry. Co. v. Leatherwood, 250 U. S. 478 ....3, 11
United States v. Seaboard Air Line Ry. Co., 22 F. (2d) 113 .....15, 16

STATUTES CITED.

Interstate Commerce Act of February 4, 1887, as amended, 49 U. S. C. A. Sections 1, 2, 6 and 20(11) 7
Judicial Code, as amended by the Act of February 13, 1925, Section 240, 28 U. S. C. A., Sec. 347, 43 Stat. 938 ..... 5, 6

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No.

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner,*

v.

P. L. MILLER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Pennsylvania Railroad Company respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to review the final judgment entered in the above cause on December 12, 1941, petition for rehearing having been denied on January 2, 1942. (R. 39, 45)

SUMMARY STATEMENT.

Petitioner, a common carrier by railroad, brought its action in the District Court of the United States for the Eastern District of Texas, Sherman Division, to recover from respondent (the consignor-defendant below) its lawful

freight charges for the transportation in June, 1935, of three consignments of onions from points of origin in the State of Texas to Pittsburgh, Pennsylvania. (R. 3-6) The shipments were refused at destination, and upon order of the consignor (respondent) the ladings were sold by the carrier, producing $485.07 less than the accrued transportation charges. (R. 5, 6, 15) Suit was instituted June 10, 1938, to recover such balance of charges. (R. 3)

Respondent alleged, as an affirmative defense, that the ladings had been damaged in transit due to carrier's negligence, in an amount in excess of the unpaid charges claimed and that petitioner, therefore, was not entitled to recover. (R. 9-10, 14)

The bills of lading contained the following pertinent condition:

> "Sec. 2(b). *As a condition precedent to recovery,* claims must be filed in writing * * *; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, *no carrier hereunder shall be liable, and such claims will not be paid.*" (Italics supplied) (R. 8)

Claims for damage to the ladings were duly filed by respondent and written notices of their disallowance were given by petitioner, but no other or further action was had in respect of said claims until they were asserted by way of affirmative defense to petitioner's instant suit for the unpaid transportation charges,—more than two years and one day after the claims had been disallowed in writing. (R. 14)

The trial in the District Court resulted in a verdict of the jury (1) in favor of petitioner for the balance of its transportation charges as claimed and (2) for respondent

in an identical amount as and for damages to the ladings. Judgment on said verdict was entered September 21, 1940, (R. 25-26) and a motion for new trial was overruled November 28, 1940. (R. 26-27) Appeal was taken by petitioner to the United States Circuit Court of Appeals for the Fifth Circuit and on hearing judgment of the District Court was affirmed by a divided court; Holmes, Cir. J., delivering the opinion for the majority, with Hutcheson, Cir. J., dissenting. (R. 33-38; 124 F. (2d) 160)

QUESTION PRESENTED.

Whether a shipper's claim for damage to an interstate shipment, liability for which has been *extinguished* by operation of the provisions of the uniform bill of lading, nevertheless may be revived, and asserted by way of recoupment or otherwise to defeat the carrier's claim for its transportation charges on such shipment?

REASONS FOR ALLOWANCE OF WRIT.

1. This case raises an important question of Federal law covering interstate commerce, affecting shippers and carriers throughout the country, and the application and interpretation of provisions of the uniform bill of lading, approved by the Interstate Commerce Commission.

2. The decision of the majority of the Circuit Court of Appeals is in conflict with many decisions of this court, particularly in that:

(a) It fails to give effect to the provisions of the uniform bill of lading concerning the time limit for the institution of suits on damage claims, contrary to *Georgia, Fla. & Ala. Ry. Co.* v. *Blish Co.*, 241 U. S. 190, and *Texas & Pac. Ry. Co.* v. *Leatherwood*, 250 U. S. 478, which hold that the terms of the bill of lading cannot be waived voluntarily, or by estoppel or otherwise.

(b) It fails to give effect to the provisions of the uniform bill of lading which state that when suits on damage claims are not instituted within the time limit therein provided "no carrier * * * shall be liable, and such claims will not be paid," contrary to *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, and *Chesapeake & O. Ry. Co.* v. *Martin*, 283 U. S. 209, which hold that limitations such as this destroy not only the remedy but the liability as well.

(c) It fails to hold, contrary to *Chicago & N. W. Ry. Co.* v. *Lindell*, 281 U. S. 14, that while the carrier's claim for transportation charges and the shipper's claim for damages may be adjudicated in one suit, they nevertheless must be treated independently.

3. The opinion of the majority of the Circuit Court of Appeals permits preferences and discriminations among shippers prohibited by the Interstate Commerce Act, in that the limitation provisions with respect to shippers' suits for damages may be waived in certain instances and enforced in others, and a uniform rule of liability throughout the country will be replaced by conflicting applications of the rule of recoupment as defined by statute and judicial construction in the several states.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit.

THE PENNSYLVANIA RAILROAD COMPANY,
By FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
R. AUBREY BOGLEY,
WILLIAM F. ZEARFAUS,
JESSE F. HOLT,
Counsel for Petitioner.

IN THE

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No.

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner*,

v.

P. L. MILLER, *Respondent*.

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The majority opinion of the United States Circuit Court of Appeals for the Fifth Circuit, written by Holmes, Cir. J., (R. 33-36) and the dissenting opinion of Hutcheson, Cir. J., (R. 36-38) are reported at 124 F. (2d) 160, 162.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit, here sought to be reviewed, was entered December 12, 1941. (R. 39) Application for rehearing was filed December 26, 1941, (R. 40) and was denied January 2, 1942. (R. 45)

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of Febru-

ary 13, 1925 (28 U. S. C. A., Sec. 347, 43 Stat. 938); Rule 38, Sup. Ct. U. S.

STATEMENT.

The principal facts are set forth in the petition, *supra*, pp. 1-3.

SPECIFICATIONS OF ERROR.

It is submitted that the United States Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that a shipper's claim for damage to an interstate shipment, liability for which has been extinguished by operation of the provisions of the uniform bill of lading, nevertheless may be revived, and asserted by way of recoupment or otherwise, to defeat the carrier's claim for its transportation charges on such shipment.

2. In holding that the terms of the uniform bill of lading, which provide that "as a condition precedent to recovery * * * suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim * * *," may be waived and ignored.

3. In refusing to hold that the shipper's failure to institute suit for damages within the time prescribed in the bill of lading not only terminated the shipper's claim and cause of action, but extinguished the carrier's liability therefor, where the bill of lading provided that in the event of such failure "no carrier hereunder shall be liable, and such claims will not be paid."

4. In attempting to apply the Texas law of recoupment contrary to the specific provisions of the bill of lading contract as interpreted by the decisions of this Court.

5. In affirming the judgment of the District Court of the United States for the Eastern District of Texas, Sherman Division.

STATUTE INVOLVED.

The statute involved is the Interstate Commerce Act of February 4, 1887, as amended, particularly Sections 1, 2, 6 and 20(11). (49 U. S. C. A., Sections 1, 2, 6 and 20(11).)

ARGUMENT.

I.

The lower Court erred in holding that a shipper's claim for damage to an interstate shipment, liability for which has been extinguished by operation of the provisions of the uniform bill of lading, nevertheless may be revived, and asserted by way of recoupment or otherwise, to defeat the carrier's claim for its transportation charges on such shipment.

No question of fact was presented to the Circuit Court of Appeals and none is presented here. As shown by the agreed statement of facts established by the testimony, it was undisputed that the unpaid balances of the carrier's transportation charges were correctly assessed, and the fact that respondent failed to institute suit within two years and one day after the denial in writing by the carrier of his claim for damages was admitted. (R. 13-15)

Accordingly, the District Court instructed the jury as a matter of law to find for the petitioner in the full amount of the transportation charges claimed by it (R. 17-18) and further charged that "although an affirmative action upon the subject of it [respondent's claim for damages] may be barred by the statute of limitation, yet it is available to the defendant as a matter of reduction against the claim of plaintiff and only to the extent of the claim of plaintiff." (R. 20)

No question was raised in the Circuit Court of Appeals as to the sufficiency of respondent's evidence in support of his claim for damages, and the sole question then and now presented is whether a shipper may assert a claim for damages by way of recoupment in defense of a suit brought by a car-

rier to recover its transportation charges, where the shipper's claim is barred and extinguished by operation of applicable provisions of the bill of lading contract between the parties.

Section 2(b) of the bill of lading provides as follows:

> "*As a condition precedent to recovery,* claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. *Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.*" (Italics supplied)

This Court has stressed many times the necessity for uniform construction and application of the provisions of the uniform bill of lading governing interstate shipments, and has held that the interpretation of such provisions presents an important Federal question. In *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632, 636, 639, this Court said:

> "As the shipment was interstate, and the bill of lading was issued pursuant to the Federal Act, the question whether the contract thus set forth had been discharged was necessarily a Federal question. * * *
>
> * * * *
>
> "*Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a Federal question.* As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions." (Italics supplied)

See also *Chesapeake & Ohio Ry.* v. *Martin*, 283 U. S. 209, 212-213, and cases therein cited.

The right to adjudicate in the same proceeding the carrier's claim for transportation charges and the shipper's claim for damages was long the subject of opposing authorities until this Court answered the question in the affirmative in *Chicago & North Western Ry. Co.* v. *Lindell*, 281 U. S. 14, 17. After pointing out, however, that since the enactment of the Interstate Commerce Act, "carriers may not accept * * * a release of claim for damages in payment for transportation," this Court held that there was no reason why the *separate* claims could not be adjudicated in one action, saying:

> "The adjustment of defendant's demand by *counterclaim* in plaintiff's action rather than by independent suit is favored and encouraged by the law. * * *
>
> "* * * The adjudication in one suit of the *respective claims* of plaintiff and defendant is the practical equivalent of charging a judgment obtained in one action against that secured in another. Neither is to be distinguished from payment in money." (Italics supplied)

This Court thus clearly laid down the rule that claims for transportation charges and claims for damages may not be used in payment and satisfaction of each other, although independently considered, they may be adjudicated in the same proceeding. The effect of the majority opinion below, however, is to permit a claim for damages, barred and extinguished by the provisions of the bill of lading and therefore incapable of being reduced to judgment, to be used in payment of the admitted lawful claim of the carrier for its transportation charges.

The fallacy of the majority opinion below may be found in one sentence thereof, reading as follows:

> "The cited portion of the bill of lading is a limitation upon the time within which suits to enforce the recovery of claims may be instituted, *and limits the*

> *period of existence of an action for recovery against the carrier*, but is not a limitation upon a defense by way of recoupment." (Italics supplied)

In other words, the majority below find that while the shipper no longer had a cause of action against the carrier, which he could enforce and reduce to judgment, because the period of its existence had expired, he nevertheless could assert his claim by way of recoupment and use it to satisfy the carrier's claim for transportation charges.

In *Georgia, Fla. & Ala. Ry.* v. *Blish Co.*, 241 U. S. 190, this Court dealt with an earlier form of bill of lading, which similarly provided that unless claims for damage were filed in writing with the carrier within a certain time, "the carrier shall not be liable." Mr. Justice Hughes, then Associate Justice, speaking for the Court, pointed out that it was "quite as competent * * * for the parties to agree upon reasonable notice of the claim as a *condition of liability*," (p. 195) and made the following observation, which is particularly appropriate here:

> "In this view, it necessarily follows that the effect of the stipulation could not be escaped by the mere *form of the action*. The action is in trover, but as the state court said, 'if we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier.' 15 Ga. App., p. 147." (p. 197) (Italics supplied)

Respondent seems to take great comfort in the charm supposedly given to his claim by its designation as recoupment, and the majority of the Circuit Court of Appeals, contrary to the admonition of this Court above quoted, finds, in effect, that respondent's claim, admittedly having ceased to exist, had been resuscitated upon being clothed with the procedural title of recoupment. But call it what you will, whether an action in trover or a defense of recoupment, it is still "an action for damages against the * * * carrier."

II.

The lower Court erred in holding that the terms of the uniform bill of lading, which provide that "as a condition precedent to recovery * * * suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim * * *," may be waived and ignored.

The provisions of the bill of lading limiting the time within which suits for damages may be brought against the carrier and providing for the extinguishment of such claims and of the carrier's liability therefor are as much a part of the contract of carriage as the obligation of the carrier to transport and the duty of the shipper to pay the duly published legal charges therefor. As this Court many times has said, the terms of these bills of lading, which have the force of statute, may not be waived by the parties, and it is respectfully submitted that even a Court, "in equity and good conscience," as loosely suggested by the majority opinion below, may not vary the terms of such a contract.

In the *Blish* case, *supra*, (241 U. S. 190, 197) this Court said:

> "* * * But the parties *could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms* which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed." (Italics supplied)

In *Texas & Pac. Ry. Co.* v. *Leatherwood*, 250 U. S. 478, 481, Mr. Justice Brandeis, speaking for this Court, after referring to the *Blish* case, went on to point out that the provisions of the bill of lading have the force of statute, saying:

> "* * * The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and *its terms in respect to conditions of liability* are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. *Each has in effect the force of a statute,* of which all affected must take notice. That a carrier cannot be prevented by *estoppel or otherwise* from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled." (Italics supplied)

In the *Martin* case, *supra* (283 U. S. 209, 221) this Court, considering the effect of a provision in the bill of lading similar to the one here involved, held that the question was " a federal question to be determined by the application of federal law" and was unaffected by local statute or judicial determination, saying:

> "The determination by this court of that question is binding upon the state courts, and must be followed, *any state law, decision, or rule to the contrary notwithstanding.*" (Italics supplied)

Certainly, if the "conditions of liability" contained in the bill of lading, having force of a Federal Statute, may not be waived or ignored by the parties, and the carrier may not be prevented by estoppel or otherwise from insisting upon the shipper's compliance therewith, the majority of the Court below clearly erred in holding, in effect, that the carrier, by instituting its suit to recover its transportation charges, which it was required to do by the Interstate Commerce Act, could revive, by opening the door of recoupment or otherwise, the shipper's claim for damages and the carrier's liability therefor, when the claim had ceased to exist and the liability had terminated under the provisions of the bill of lading.

III.

The lower Court erred in refusing to hold that the shipper's failure to institute suit for damages within the time prescribed in the bill of lading not only terminated the shipper's claim and cause of action, but extinguished the carrier's liability therefor, where the bill of lading provided that in the event of such failure "no carrier hereunder shall be liable, and such claims will not be paid."

While the decisions of this Court above cited appear to answer the question, all doubt that failure to comply with the condition of liability provisions of the bill of lading destroys the shipper's cause of action and extinguishes the carrier's liability is dispersed by the decision of this Court in *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 667-668. In that case, an action was brought by the shipper after expiration of the time allowed by the Interstate Commerce Act, which provided that, "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after; * * *". This Court said:

> "Under such a statute the lapse of time not only bars the remedy but *destroys the liability* (*Finn* v. *United States*, 123 U. S. 227, 232) whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. * * * For when it appeared that the complaint had not been filed within the time required by the statute it was evident, *as matter of law,* that the plaintiff had *no cause of action.*" (Italics supplied)

The instant case deals with a condition, incorporated in the bill of lading pursuant to Section 20(11) of the Interstate Commerce Act and having the force of Statute, which is more specific and forceful than the limitation provision

involved in the *Phillips* case, in that after stating a definite period of limitation, it provides that upon expiration of that period, "no carrier hereunder shall be liable, and such claims will not be paid."

IV.

The lower Court erred in attempting to apply the Texas Law of recoupment contrary to the specific provisions of the bill of lading contract as interpreted by the decisions of this court.

The majority of the Court below held that, "though appellee's (respondent's) cause of action to recover affirmatively for the damages he sustained was cut off by the limitations in the bill of lading at the time this action was brought against him, his right to claim damages by way of recoupment remained," on the theory that, "the defense of recoupment * * * survives as long as the cause of action upon the (plaintiff's) claim exists."

Whether or not the majority correctly construed and applied the Texas law of recoupment, it is submitted, is unimportant. The leading State case of *Morriss-Buick Company* v. *Davis,* 127 Texas 41, 91 S. W. (2d) 313, is cited in support of their conclusion, and Hutcheson, Cir. J., in his well-reasoned dissenting opinion, correctly points out that under the rule laid down in that case, recoupment will not lie, quoting from that opinion, "where the subject matter of a defense interposed by the defendant constitutes *an independent cause of action which does not go to the foundation of the plaintiff's demand,* it cannot effect a reduction of the amount of plaintiff's recovery except by way of set-off, and the statutes of limitation are available to plaintiff in respect to such defense." (R. 38) (Emphasis supplied)

What is of importance here, however, is the fact that the opinion of the majority below, if allowed to stand, will permit the application of a rule of procedure, as variably expressed and interpreted in the several States, to abrogate the terms of the uniform bill of lading, adopted pursuant to

a Federal Statute, which has for its primary purpose the uniform regulation of interstate transportation of freight and the prevention of preferences and discriminations in connection therewith.

All of the authorities cited by the majority below deal with recoupment as applied to claims barred by *statutes* of limitation. The question here, however, does not involve a limitation fixed by statute, but a "condition of liability" fixed by contract, which this Court has held may not be waived or ignored, or emasculated by a form of action. Even the United States, though never barred by statutory limitations or laches, is held to strict compliance with the bill of lading requirement for filing claims for damages within the time therein prescribed. *United States* v. *Seaboard Air Line Ry. Co.*, 22 F. (2d) 113.

To permit the terms of the bill of lading contracts to be ignored and to require or permit shippers and carriers to follow, or purport to follow, the varying adaptations of the doctrine of recoupment by state authorities, would thwart the very purpose of the Interstate Commerce Act and would result in preferences and discriminations which the Act was designed to prevent.

As this Court said in the *Phillips* case, *supra*, (236 U. S. 662, 667):

> "* * * To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. * * *"

Carried to its extreme, the opinion of the majority below would permit a shipper to assert a claim for damages by way of recoupment in defense of the carrier's action for freight charges although a claim had never been filed with the carrier as required by the bill of lading, which this Court has found to be necessary and proper "to provide for the ascertainment of liability before the means of proof should be lost." *United States* v. *Seaboard Air Line Ry. Co., supra,* 22 F. (2d) 113, 116.

As a further example of the absurd preference and discrimination which the majority opinion below permits, a shipper who had prepaid his freight charges would be held to strict compliance with the terms of the bill of lading regarding the filing of claim and suit for damages resulting from the carrier's negligence, which would include the freight charges so paid (*Pennsylvania R. R. Co.* v. *Olivit Bros.,* 243 U. S. 574), while the shipper who had not paid his freight charges could successfully defend a suit brought by the carrier to recover its charges by alleging and proving by way of recoupment a claim for damages against the carrier, without ever having filed a claim with the carrier or without complying with the other provisions of the bill of lading with respect thereto.

The preferences and discriminations thus permitted by the opinion of the majority below would be in violation of the mandates of the Interstate Commerce Act and repugnant to the expressed intention of the Congress to provide an uniform system and standard of dealing between shippers and carriers in interstate commerce.

V.

The lower Court erred in affirming the judgment of the District Court of the United States for the Eastern District of Texas, Sherman Division.

For the reasons above set forth, the lower Court, by its majority opinion, erred in affirming the judgment of the District Court of the United States for the Eastern District of Texas, Sherman Division, and it is respectfully submitted that the writ of certiorari should be issued, as prayed.

THE PENNSYLVANIA RAILROAD COMPANY,

By FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
R. AUBREY BOGLEY,
WILLIAM F. ZEARFAUS,
JESSE F. HOLT,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1095.

THE PENNSYLVANIA RAILROAD COMPANY,
PETITIONER,

VS.

P. L. MILLER, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Sherman, Texas,
A. F. Nossaman,
Sherman, Texas,
O. H. Woodrow,
Sherman, Texas,
Counsel for Respondent.

INDEX

Summary Statement 1-2

First Counter Point—

Neither preference, discrimination, nor lack of uniformity in freight rates results from permitting the equitable defense of recoupment, under the admitted facts presented in this cause 3

Statement, authorities and argument 3

Second Counter Point—

The bill-of-lading does not, by its terms, preclude the defense of abatement or recoupment 3

Statement, authorities and argument 3-13

Third Counter Point—

A bill of lading is a "written contract" within the meaning of the four year statute of limitations (Revised Civil Statutes of Texas, Article 5527). The two year statute of limitations relied upon by the carrier has no application 13

Statement, authorities and argument 13

Concluding Remarks 14-16

Table of Cases

Amori Independent Telephone Company vs. Cox, 60 So. 641, 103 Miss. 541 10

Aultman & Co. vs. Torrey, 55 Minn. 492, 57 N. W. 211 7

Beecher vs. Baldwin, 55 Conn. 419, 12 Atl. 401, 3 Am. St. Rep. 57 7

Blackshear vs. Dekle, 120 Ga. 766, 48 S. E. 311 7

Bull vs. United States, 295 U. S. 247, 55 S. Ct. 695 ... 3, 4, 6, 9
Campbell vs. Hughes, 73 Hun. (N. Y.) 14, 25 N. Y. S. 1021 ... 7
Chicago & Northwestern Ry. Co. vs. Lindell, 281 U. S. 14, 17 ... 2
Cleveland Clinic Foundation vs. Humphries, 97 F. 2d 849 ... 9
Conner vs. Smith, 88 Ala. 300, 7 So. 150 ... 7, 9
Crossett Lumber Co. et al. vs. United States, 87 F. 2d 930 ... 3, 4, 7
Dixie Margarine Co. vs. Commissioner of Internal Revenue, 115 F. 2d 445 ... 3, 4, 14
E. Gerli & Co. vs. Cunard S. S. Co., 48 F. 2d 115 ... 12
Gulf, C. & S. F. Ry. Co. vs. Hines et al., 250 S. W. 1013 ... 12
Indiana Harbor Belt R. Co. vs. Jacob Stern & Sons, 37 Fed. Supp. 690 ... 11
Kaup vs. Schinstock, 88 Neb. 95, 129 N. W. 184 ... 7
Luther vs. Mathis, 211 Ill. App. 596 ... 10
J. C. Lysle Milling Co. vs. N. Alabama Grocery Company, 77 So. 748, 201 Ala. 222 ... 10
Merry Realty Co. vs. Shamokin & Hollis Real Estate Company, 174 N. Y. S. 627 ... 10
Raymond vs. State, 54 Miss. 562, 28 Am. Rep. 382 ... 10
Shell Petroleum Corporation vs. Royal Petroleum Corporation, 137 S. W. 2d 753 ... 5
Stewart vs. Simon, 111 Ark. 358, 163 S. W. 1135, Ann. Cas. 1196A, 825 ... 7
Texarkana and Ft. S. Railway Company et al. vs. Houston Gas and Fuel Company, 51 S. W. 2d 284 ... 13
Texas, etc., R. Co. vs. Reiss, 183 U. S. 621 ... 12
The Queen of Pacific, 180 U. S. 49 ... 12
Webb vs. American Surety Company of New York, 88 F. 2d 171 ... 6
Williams vs. Neely, (C. C. A.) 134 Fed. 1, 69 L. R. A. 232 ... 7

TEXT BOOKS

16 R. C. L. 942 10
10 Corpus Juris 181, Sec. 234 11
Revenue Act of 1928, Section 610 3

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1095.

THE PENNSYLVANIA RAILROAD COMPANY,
PETITIONER,

VS.

P. L. MILLER, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

P. L. Miller, respondent, respectfully prays that the issuance of the writ of certiorari be denied, the application therefore being wholly without merit.

SUMMARY STATEMENT.

The parties will for clarity be called "carrier" and "shipper."

The carrier admits in the record that it failed to perform its contract of carriage to safely transport shipper's property and that it negligently destroyed three cars of onions entrusted to its care.

The carrier admits that the shipper promptly filed his claim covering such loss.

The carrier admits wrongfully to have refused payment of these admittedly just claims.

The shipper in view of the smallness of the claims and the prohibitive expense of litigation, did not file suit seeking an affirmative recovery of his loss.

The carrier admits that had it filed suit against the shipper within the two year period, that the shipper under the authority of *Chicago & North Western Ry. Co. v. Lindell*, 281 U. S. 14, 17, could have filed an affirmative cross action and under the admitted facts probably would have recovered from it a substantial judgment, over and above the carrier's claim for deficiency in the freight.

The carrier admits that it waited until the expiration of the two year period prescribed in the bill of lading for the filing of suit by the shipper for affirmative recovery, the carrier believing that it could thereafter maintain this action against the shipper and thereby cut off the equitable defense of recoupment, and impose upon the shipper the double loss of the value of his property in addition to the freight charges.

The record discloses, that upon the filing of the shipper's answer in the trial court, pleading that—

> "Plaintiff is not entitled to recover from defendant the loss resulting from its own negligence and failure to perform the contract of carriage,"

and setting up such loss, *not as a cross-action*, but purely as a defense by way of equitable recoupment, that the carrier then pled the two year contractional limitation in the bill of lading and the two year Texas Statute of Limitations.

The foregoing facts were admitted as shown by the Transcript of Record Page 14, in which the carrier admits that no question is raised as to the sufficiency of the pleading and proof in support of the shipper's claim that the carrier negligently destroyed his property.

The carrier further affirmatively admits in his application for certiorari that—

> "No question was raised in the Circuit Court of Appeals as to the sufficiency of respondent's evidence in support of his claim for damages" (P. 7).

FIRST COUNTER POINT.

Neither preference, discrimination, nor lack of uniformity in freight rates results from permitting the equitable defense of recoupment, under the admitted facts presented in this cause.

STATEMENT, AUTHORITIES AND ARGUMENT.

In taxation the absolute freedom from preferences and discriminations and the requirement that all taxes shall be uniform throughout the United States are Constitutional requirements (Art. I, Sec. 8).

If the equitable application of the principles of recoupment is obnoxious to these Constitutional requirements, *then the defense of recoupment would necessarily be denied in all tax matters.*

That this defense does not create preferences, or cause discrimination, and does not militate against uniformity in cases where uniformity is required is conclusively shown in the following decisions which have permitted this defense in tax matters.

These decisions are:

Bull v. *United States,* 295, U. S. 247, 55 S. Ct. 695.

Dixie Margarine Co. v. *Commissioner of Internal Revenue,* 115 F. 2d 445.

Crossett Lumber Co. et al. v. *United States,* 87 F. 2d 930.

SECOND COUNTER POINT.

The bill-of-lading does not, by its terms, preclude the defense of abatement or recoupment.

STATEMENT, AUTHORITIES AND ARGUMENT.

The existence of a Federal Statute (Revenue Act of 1928, Section 610) forbidding the refunding of taxes except where suits are filed within a prescribed time limit

and using such mandatory language as "but *only* if such suit is begun within two years, etc." does not, even in an action at law, preclude the defendant from interposing the equitable defense of recoupment where the defendant has not been guilty of such laches as would make the defense inequitable.

The following cases we think support the above ruling:

Dixie Margarine Co. v. *Commissioner of Internal Revenue*, 115 F. 2d 445.

Crossett Lumber Co. et al. v. *United States*, 87 F. 2d 930.

Bull v. *United States*, 295 U. S. 247, 55 S. Ct. 695.

The bill of lading neither expressly nor impliedly limits the time wherein the defense of breach of contract and abatement may be interposed against the carrier's action for the collection of freight charges. It does not deny the shipper the equitable defense of recoupment.

The bill of lading merely limits the time in which:

(a) Claims may be filed;

(b) In which suits may be instituted.

The prefacing sentence in the provision of the bill of lading relied upon by the carrier is;

"As a condition precedent to *recovery*."

Then follow provisions merely limiting the time in which:

(a) Claims may be filed;

(b) In which suits may be instituted.

The bill of lading further provides:

> "Where claims are not filed '*or*' suits not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable and such claims will not be paid."

The carrier on page 12 of its brief in the Circuit Court re-writes this provision and suggests that it should be made to read as follows:

> "No liability exists if there is a failure to either present the claims in writing within nine months after delivery, or if the suit is not instituted thereon within the time stipulated. In either case there is no liability."

It would have been a simple matter for the carrier to have so worded the contract had it so desired but it did not.

Instead the requirement regarding the filing of claims and the institutions of suits is written in the alternative.

The word "or" is used and not the word "and."

We construe the word "or" to mean, "one or the other."

This construction of the word "or" is supported by an opinion of the Supreme Court of Texas in the case of *Shell Petroleum Corporation* v. *Royal Petroleum Corporation et al.*, 137 S. W. 2d 753.

Giving the words used in the contract their ordinary meaning it is quite clear that it is provided that the carrier shall not be liable unless the shipper does one or the other of the two things required.

The shipper must either file his claims within the time specified or he shall file suit within two years and one day from the date of the rejection of the claim.

It does not provide that the shipper shall do both.

The shipper did file his claims within the required time. Thus the carrier was put on notice of the shipper's claim that the carrier had negligently destroyed the commodity and that the carrier's negligence was the cause of the loss.

The carrier therefore is placed at no disadvantage and it is not prejudiced by the failure of the shipper to file suit and there is no inequity in permitting the carrier to plead as a defense the breach by the carrier of the

carrier's contract to transport the commodity safely and the loss which resulted by such breach.

Besides, the shipper has not asserted the carrier's liability in the sense that an affirmative claim had been made for loss and damage.

The gist of the defense is that the carrier who occasioned the loss by its own negligence should not be permitted to collect such loss from the shipper, whose commodity the carrier destroyed.

In its brief in the Circuit Court (Page 32) the carrier admits that Sections one and two of these conditions are provisions as to filing claims and institution of suits.

The carrier admits that these provisions do not deal with the question that we have here—of abatement by way of recoupment.

"Recoupment" is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded, and is never barred by limitation so long as the main action itself is timely.

The Circuit Court of Appeals, Fifth Circuit, in the case of *Webb* v. *American Surety Company of New York*, 88 F. 2d 171, held—

> "A barred recoupment may defeat a claim but may not be made the basis of a judgment for the excess."

That court in the same case further held—

> "I think this suit is one essentially in equity, requiring the equitable application of the principles of recoupment and set-off and the granting of equitable relief (Citing authorities). In such a case statutes of limitations are applied by analogy as laches, but only where the facts make it inequitable not to do so (Citing authorities)."

The Supreme Court of the United States in the case of *Bull* v. *United States*, 295 U. S. 247, 55 Sup. Ct. Rep. 695, 79 L. Ed. 1421, held:

> "If the claim for income tax deficiency had been the subject of a suit, any counterclaim by recoupment of the over payment of a state tax could have been asserted by way of defense and credit obtained, notwithstanding the statutes of limitation had barred an independent suit against the Government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the Statute of Limitation so long as the main action itself is timely."

Other cases holding that such defense is never barred by the Statute of limitations, so long as the main action itself is timely, are:

Williams v. *Neely*, (C. C. A.) 134 Fed. 1, 69 L. R. A. 232.

Conner v. *Smith*, 88 Ala. 300, 7 So. 150.

Stewart v. *Simon*, 111 Ark. 358, 163 S. W. 1135, Ann. Cas. 1196A, 825.

Beecher v. *Baldwin*, 55 Conn. 419, 12 Atl. 401, 3 Am. St. Rep. 57.

Blackshear v. *Dekle*, 120 Ga. 766, 48 S. E. 311.

Aultman & Co. v. *Torrey*, 55 Minn. 492, 57 N. W. 211.

Kaup v. *Schinstock*, 88 Neb. 95, 129 N. W. 184.

Campbell v. *Hughes*, 73 Hun. (N. Y.) 14, 25 N. Y. S. 1021.

In *Crossett Lumber Company et al.* v. *United States*, 87 F. 2d 930, it was asserted that because of the emphatic and mandatory language of the Revenue Act of 1928, Section 610, wherein it is provided that recovery of amounts erroneously refunded may be recovered by suit brought in the name of the United States but only if such suit is begun within two years after the making of such refund, that in a taxpayer's suit brought to recover an over assessment of income tax the United States Government could not plead the erroneous refund because it had not filed suit within the statutory period.

The Circuit Court overruled this contention using the following language:

> "In the case at bar one act, the erroneous valuation of the inventory of November 30, 1926, set in motion a course of events resulting in the erroneous refund to the taxpayer on one hand, and an overassessment in his favor on the other. Had the Government, within the time limited, brought an action to recover the refund, made erroneous by the inventory, the taxpayer could have set up by way of defense its overpayment of income tax of the following years, induced by the same erroneous inventory. There is a direct connection in this case between income taxes paid in successive years based upon a single erroneous inventory as there was between the estate tax erroneously determined and income tax correctly determined on the same item in *Bull* v. *United States*, *supra*. That being the situation, it is immaterial that the parties are reversed and the taxpayer is bringing the suit. In *Bull* v. *United States*, 295 U. S. 247, at page 262, 55 S. Ct. 695, 701, 79 L. Ed. 1421, the court said:
>
> > 'The circumstance that both claims, the one for estate tax and the other for income tax, were prosecuted to judgment and execution in summary form does not obscure the fact that in substance the proceedings were actions to collect debts alleged to be due the United States. It is immaterial that in the second case, owing to the summary nature of the remedy, the taxpayer was required to pay the tax and afterwards seek refundment. This procedural requirement does not obliterate his substantial right to rely on his cross-demand for credit of the amount which, if the United States had sued him for income tax, he could have recouped against his liability on that score.'
>
> Neither is it material in the instant case that the action by the appellant was delayed until the Government's right of action was tolled.

> 'Such a defense is never barred by the statute of limitations so long as the main action itself is timely.'

Bull v. *United States*, 295 U. S. 247, at page 262, 55 S. Ct. 695, 700, 79 L. Ed. 1421."

The Supreme Court of Alabama in the case of *Conner* v. *Smith*, 88 Ala. 300, 7 So. 150, speaking of recoupment said:

> "So long as the contract, upon a breach of which the claim is predicated, subsists, and may be enforced, the claim itself may be pleaded in reduction, at least, of the demand on the contract; and this, notwithstanding the matter of recoupment, independently considered, may be barred, not only when it is pleaded, but also when the right of action, against which it is asserted, accrued. Wood, Lim., pp. 602, 603, Sec. 282."

The Supreme Court of the United States in *Bull* v. *United States*, 295 U. S. 247, referred to the above Alabama case as authority on this proposition.

In the case of *Cleveland Clinic Foundation* v. *Humphries*, 97 F. 2d 849, the Sixth Circuit Court of Appeals held the following:

> "Her answer set up a plea of recoupment which denies the validity of the defendant's claim for the full amount. It was not an independent cross-claim but was confined to matters arising out of or connected with the transaction which formed the basis of the defendant's crossbill. It goes only in reduction of defendant's claim, and can be used as a cross-action only to the extent of their demand. Judgment cannot be obtained by plaintiff for any balance in her favor against the defendants. The Statute of Limitation has no application."

Many other authorities might be cited, but we believe the above amply support our position that the shipper has the right to plead and prove loss and damage

arising from the breach of the very contracts that plaintiff made the basis of its suit for the purpose of recoupment, that is, to offset the claim for deficiency freight.

At common law, in recoupment, claim of defendant must arise out of transaction that constitutes plaintiff's cause of action and may rest in tort or contract or be for liquidated or unliquidated damages.

Merry Realty Co. v. *Shamokin & Hollis Real Estate Company*, 174 N. Y. S. 627.

Luther v. *Mathis*, 211 Ill. App. 596.

Raymond v. *State*, 54 Miss. 562, 28 Am. Rep. 382.

J. C. Lysle Milling Co. v. *N. Alabama Grocery Company*, 77 So. 748, 201 Ala. 222.

Amori Independent Telephone Company v. *Cox*, 60 So. 641, 103 Miss. 541.

The term "recoupment" is defined in R. C. L. as follows:

> "At common law it is the right of the defendant, in the same action, to claim damages from the plaintiff either because he has not complied with some cross-obligation of the contract on which he sues, or because he has violated some duty which the law imposes upon him in the making or performance of that contract, 24 R. C. L. 793; the doctrine under which in an action for breach of contract the defendant may show that the plaintiff has not performed the same contract on his part and may recoup his damages for such breach in the same action whether liquidated or not." 16 R. C. L. 942.

The carrier admits in its brief in the Circuit Court (Page 32) that the bill of lading contains no provision denying the equitable defense of recoupment, the brief asserting that:

> "No exception of any kind was made, *e. g.*, the off-setting of transportation charges against a claim for damages where the latter has not been asserted within the time allowed."

Because there is no contractual restriction denying the shipper the right to thus defend, the carrier urged (Page 32) Circuit Court Brief,

> "It is obvious that if such an exception had been intended, then the sentence above quoted from section 2(b) of the conditions would have contained specific provisions to that effect. Certainly such an exception cannot arbitrarily be read into the contract, etc."

The difficulty with the carrier's line of reasoning is that it is in conflict with the well established rule by which the provisions of a bill of lading are construed.

In 10 Corpus Juris, page 181, Section 234, this rule is stated:

> "As restrictions of carrier's liability in receipts or bills-of-lading drawn up and executed by it are for its benefit and are interposed for the purpose of escaping a liability which would otherwise be imposed by law, they are to be strictly construed as against the carrier and in favor of the shipper."

In the case of *Indiana Harbor Belt R. Co.* v. *Jacob Stern & Sons*, 37 Fed. Supp. 690, this rule was stated as follows:

> "Even if we regarded this tariff as capable of two interpretations, certain well-recognized rules of tariff interpretation would require us to select the interpretation above made. Tariffs are written by the carriers. It is presumed that they have used all the words necessary to protect their own interest. Therefore, it is the rule, followed by the courts and the Commission, in doubtful cases, to adopt that interpretation of the tariff which is most favorable to the shipper. *United States* v. *Gulf Ref. Co.*, 268 U. S. 542, 45 S. Ct. 597, 69 L. Ed. 1082."

This rule of construction is further stated:

> "A bill of lading having been prepared by the carrier is to be construed most strongly against it.

> *Lehigh Valley Transp. Co.* v. *Post Sugar Co.*, 128 Ill. Atl. 600 (affm. 228 Ill. 121). Any reasonable doubt as to the proper construction of the printed portion of a bill of lading should be resolved against the carrier which prepared it, as it chose the language (affm. 142 Fed. 667, 74 C. C. A. 245); *American Roofing Co.* v. *Memphis, etc., Packet Co.*, 8 Oh. S. & C. P. 490, 5 Oh. N. P. 146; 10 Corpus Juris 195, Note 58."

The Supreme Court of Texas, speaking through the Commission of Appeals in the case of *Gulf, C. & S. F. Ry. Co.* v. *Hines et al.*, 250 S. W. 1013, Par. 5, held:

> "It is a well established rule under federal authorities that, if there be any reasonable doubt as to the proper construction of a bill of lading, it should be resolved against the carrier."

Also see *E. Gerli & Co.* v. *Cunard S. S. Co.*, 48 F. 2d 115; *Texas, etc., R. Co.* v. *Reiss*, 183 U. S. 621; *The Queen of Pacific*, 180 U. S. 49.

As the carrier is at common law, as well as under the transportation act, liable for loss and damage arising from its breach of contract to transport safely the merchandise entrusted to its care, such liability remains fixed unless expressly denied by the term of the carriage contract.

Under the foregoing rule, the carrier having written the contract for the express purpose of escaping liability and having failed to put in the contract a clause denying the shipper the right to plead defensively the breach of the carrier contract and the resultant loss, in abatement by way of recoupment, we think that it should be presumed that the carrier did not intend to bind the shipper in that respect.

Where the shipper's loss, caused by the carrier's negligence is less than, or equivalent to, the freight charges, the shipper should be permitted to forego expensive and unprofitable litigation and should not be required to file a suit against the carrier in order not to waive his right

to interpose the equitable defense of recoupment, should the carrier file a suit against him after the expiration of the two years and before the termination of the three year period in which the carrier has to file its suit.

The shipper should have the right to elect whether it should file an affirmative action for the entire loss sustained by the carrier's negligence or decline to be involved in a suit against the carrier, without waiving his defense should the carrier sue.

THIRD COUNTER POINT.

A bill of lading is a "written contract" within the meaning of the four year statute of limitations (Revised Civil Statutes of Texas, Article 5527). The two year Statute of Limitations relied upon by the carrier has no application.

STATEMENT, AUTHORITIES AND ARGUMENT.

The Supreme Court of Texas in the case of *Texarkana and Ft. S. Railway Company et al.* v. *Houston Gas and Fuel Company*, 51 S. W. 2d 284, expressly holds that claims against carriers arising from a bill of lading are not barred by the two year statute but such suits come within the four year statute.

It therefore follows that the Texas Statutes of Limitations and the various constructions placed upon those statutes by the Texas Courts are not material to any issue involved in this appeal.

The sole and only issue is whether the facts involved in this suit equitably call for the application of the doctrine of recoupment.

It would be hard to conceive of a case more strongly calling for the application of the rule.

CONCLUDING REMARKS.

The distinction between the limitation as to the time of the filing of suit and the right to interpose the equitable defense of recoupment is further discussed in *Dixie Margarine Co.* v. *Commissioner of Internal Revenue,* 115 F. 2d 445, by the Circuit Court of Appeals, Sixth Circuit, in which case the taxpayer had filed a suit in the Court of Claims (12 Fed. Supp. 543) for recovery of $87,412 illegally exacted from him. A demurrer was sustained because the amount was not refundable, the same being barred by the four year Statute of Limitations. The Court of Claims holding—

> "The amounts refunded, however, did not include $87,412 which had been paid by plaintiff between March 15, 1923, and December 1, 1925, and this action is for the recovery of that amount.
>
> "Section 3226 of the Revised Statutes, as amended (26 U. S. C. A. Secs. 1672-1673) provides in part that
>
> > 'No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof.'
>
> And Section 3228 of the Revised Statutes, as amended (26 U. S. C. A, Sec. 1433), provides that
>
> > 'All claims for the refunding or crediting of internal-Revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected

> must * * * be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.'
>
> * * * * * * *
>
> "It was not legally refundable because the statute prohibited the Commissioner from refunding or crediting any tax unless claim therefor was filed within four years after payment. Legally he could not refund the tax paid back of that period.
>
> * * * * * * *
>
> "The facts show that the plaintiff had paid, beyond the statutory period for refunds, amounts it should not have paid but this court has no jurisdiction to entertain a suit for the recovery of these amounts. Any relief to which plaintiff may be entitled must come from the Congress.' "

Petitioner then filed an application for writ of certiorari in the United States Supreme Court which petition was denied (297 U. S. 713).

Later the Commissioner of Internal Revenue filed a deficiency assessment in the amount of $16,775.60 against the taxpayer on income tax. The taxpayer then set up the defense of recoupment based upon the $87,412, recovery of which was denied him in an affirmative action to recover.

It was held by the Circuit Court that notwithstanding the suit the taxpayer had instituted for recovery of this amount, and notwithstanding the fact that recovery was denied the taxpayer because of the Statute of Limitations, this item nevertheless could be asserted in abatement in the form of the equitable defense of recoupment.

The petitioner misconstrued the opinion of The Circuit Court on Page 16 of the application wherein fear is expressed that "Carried to its extreme, the opinion of the majority below would permit a shipper to assert a claim for damages by way of recoupment in defense of the carrier's action for freight charges although a claim had never been filed with the carrier as required by the bill

of lading, etc.," and would deprive the carrier from ascertaining its liability before the means of proof should be lost.

That the opinion of the Circuit Court makes no such holding is too plain for that argument to be presented here.

The opinion expressly precludes any such interpretation the facts being clearly stated and the law very correctly, in our opinion, pronounced.

The opportunity of a carrier to manipulate its litigation and to maneuver a shipper into a position such as this carrier has attempted to place this shipper, is not such a right as should be protected by the courts of the land, nor is a denial of such an opportunity a matter of sufficient public importance to warrant this court in accepting jurisdiction of this small lawsuit.

We respectfully urge that the application be denied.

Respectfully submitted,

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.....,
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